

**Britwill Investments II, Inc. d/b/a Pleasant Manor Living Center and United Food and Commercial Workers Union, Local 1000.** Case 16-CA-18085

September 17, 1997

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 26, 1997, Administrative Law Judge D. Randall Frye issued the attached bench decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, and to adopt the recommended Order.

In its exceptions, the Respondent contends, inter alia, that the judge erred in finding that it violated Section 8(a)(1) of the Act by interrogating employee Tonya Benson. For the reasons set forth below, we find no merit in the Respondent's contention.

According to Benson's credited testimony, the Respondent's administrator, Eric Feinman, came to her work area during the preelection period and asked her how she felt about the Union. Benson replied that it was none of his business. Feinman told Benson that he did not think she should vote for the Union.

On another occasion, the Respondent's director of nursing, Linda Hale, approached Benson in the break area and said, "Well, I know . . . we're not supposed to talk about this, but how are you going to vote?" Benson replied that it was none of Hale's business, and the conversation ended.

Under all the circumstances, we find that the Respondent's repeated questioning of Benson had a reasonable tendency to interfere with, restrain, or coerce her in the exercise of her Section 7 rights. There is no evidence or even a contention that Benson was an open and active union supporter. Although the interrogations did not take place in a supervisor's office, the questioners were the Respondent's two highest management officials. In addition, on both occasions, it was the Respondent, not the employee, who introduced the topic of the Union. Further, the Respondent was seeking particularized and sensitive information, i.e., how Benson intended to vote, even acknowledging on one occasion an awareness of the inquiry's impropriety. Accordingly, we conclude that the Respondent's

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

probing attempts to find out the sympathies of an employee who had not disclosed her attitude toward the Union were coercive and, therefore, a violation of Section 8(a)(1).

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Britwill Investments II, Inc. d/b/a Pleasant Manor Living Center, Waxahachie, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Elizabeth Kilpatrick, Esq.*, for the General Counsel.  
*J. Trent Scofield, Esq. (Johnston, Barton, Proctor & Powell)*, of Birmingham, Alabama, for the Respondent.

**BENCH DECISION**

**STATEMENT OF THE CASE**

D. RANDALL FRYE, Administrative Law Judge. This case was tried before me on February 12, 1997, in Fort Worth, Texas. At the conclusion of the evidentiary part of the trial, counsel for the General Counsel and counsel for Respondent presented oral argument. Thereafter, I issued a decision from the bench pursuant to Section 102.35 of the Board's Rules and Regulations, which set forth my findings of fact and conclusions of law. Subsequent to the completion of the trial, I received and reviewed the transcript of the proceeding. Pursuant to Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attached as "Appendix A," pages 121-128 of the transcript, as corrected, which embodies my decision.

**CONCLUSIONS OF LAW**

In the complaint, the General Counsel alleged the Respondent violated the Act by unlawfully interrogating employees on four different occasions and by unlawfully promising monetary benefits to an employee. I found the Respondent violated the Act with respect to two of the alleged unlawful interrogations as well as the unlawful promise of monetary benefit. I have also found the evidence insufficient to establish that the Respondent violated the Act with respect to the two alleged unlawful interrogations set forth in the complaint at paragraphs 7(a)(2) and (3).

**THE REMEDY**

Having found the Respondent has engaged in certain unfair labor practices, it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act, including the posting of a notice to employees, attached hereto as "Appendix B."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

## ORDER

The Respondent, Britwill Investments, Inc. d/b/a Pleasant Manor Living Center, Waxahachie, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their activities for, and on behalf of, United Food and Commercial Workers Union, Local 1000, or any other labor organization.

(b) Promising an employee a monetary benefit to stop helping a union supporter.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Waxahachie, Texas facility copies of the attached notice marked "Appendix B."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1996.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the alleged unlawful conduct set forth in the complaint at paragraphs 7(a)(2) and (3) be dismissed.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>2</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX A

## AFTERNOON SESSION

2:40 p.m.

JUDGE FRYE: Let's go back on the record.

We're back on the record now, and I'm just before issuing the decision in this case. Before doing so, I want to again commend the parties for the professionalism you've shown today.

And, in some respects, we might look at this case—those in the area of labor law—as one of not great complexity. But I think any time that you get involved with resolutions of credibility, it makes your cases much more difficult. But

that's our business. And the way you've handled your witnesses and the proceeding today, you're to be commended. And I thank you for it.

Okay. I'm going to begin the decision. It's from notes. I think it's coherent. It—the first five minutes or so will be devoted to some procedural matters, so bear with me as I get through this.

I find and conclude that the unfair labor practice charge in this case was filed on June 25, 1996 by the United Food and Commercial Workers Union, Local 1000, hereinafter the Union. I also find that the charge was timely served on Pleasant Manor Living Center, hereafter the Employer. Based on this charge, the underlying unfair labor practice complaint, as well as the notice of hearing, was issued on August 20, 1996 and timely served on the Company.

I find that at all material times herein, the Company is a Delaware corporation with an office and place of business in Waxahachie, Texas, where it is engaged in the operation of a nursing home providing medical care.

I further find that the 12 months preceding the issuance of complaint and notice of hearing, the Company, in conducting its business operations, derived gross revenues in excess of \$100,000 and purchased and received at its Waxahachie, Texas facility goods valued in excess of \$50,000 directly from points outside the state of Texas.

I therefore find that the Company is and has been an Employer engaged in commerce within the meaning of Section 2, Sub-sections (2), (6) and (7) of the Act.

I also find, based on the stipulation of the parties at hearing, that the Union has at all material times hereto been a labor organization within the meaning of Section 2, Sub-section (5) of the Act. This stipulation was agreed upon after the testimony of the union representative about the conduct and affairs of not only Local 100, but, also, the International Union.

Based on both the answer to the underlying unfair labor practice complaint and the stipulation at hearing, I find that at all times material herein, Administrator, Mr. Eric Feinman, Director of Nursing, Ms. Linda Hale, Dietary Manager, Ms. Dawn Williams and Assistant Dietary Manager, Ms. Evelyn Flangin were supervisors and agents within the meaning of Section 2—actually, Sections 2(11) and 2(13) of the Act.

The remaining allegations in the unfair labor practice complaint remain very much at issue. They've been denied by the Company, both in its answer and in testimony today.

The resolution, as earlier noted, of these issues will require and has required my consideration of the credibility of the witnesses. In doing so, I carefully considered the testimony of each witness. I observed their demeanor and the context or their testimony, the context in regard to the entire facts and the fact picture that we were looking at.

The alleged unlawful conduct occurred for the most part in May and June of 1996. This followed the filing of an initial petition for certification by the Union on October 19, 1995. That petition resulted in a stipulated election agreement, with an election being held by the Regional Office on December 1, 1995.

The Union lost that election and thereafter filed objections and, as I understand it, additional—or not additional, but charges that resulted in the—a decision to issue complaint and set the election aside. In June 1996, the underlying allegations in those matters were resolved by the parties through

a settlement agreement in which, among other things, they agreed to a second election. Then we have the subsequent filing of these charges. The substantive allegations of unlawful conduct are embodied in Paragraph 7 of the unfair labor practice complaint. Paragraph 7(a) alleges unlawful conduct by Mr. Feinman, and Paragraph 7(b) alleges unlawful conduct by Ms. Hale. In sum, four of these allegations involve interrogation of employees by Ms. Hale and Mr. Feinman. The remaining allegation involves a promise of benefit to an employee to cease assisting another employee who is an alleged Union supporter.

Mr. Randy Lee Washington was called by the General Counsel as its first witness. Mr. Washington testified in support of Paragraph 7(a)(1) and (2). In this regard, Mr. Washington testified that sometime in May or June 1996, while he was working in the kitchen area, Mr. Feinman approached him and asked him if he was going to vote for the Union. Mr. Washington testified on direct examination that he did not respond to this question.

Mr. Washington also testified that sometime in June of the same year, Mr. Feinman asked him if he was going around talking about the Union. When called to testify by Respondent, Mr. Feinman specifically denied that he had asked Mr. Washington as to how he was going to vote or if he was talking to anyone about the Union.

During Mr. Washington's testimony, he at times had great difficulty recalling facts. In fact, on cross-examination, he admitted that some of his testimony given today was not wholly consistent with testimony in his affidavit given to an agent of the General Counsel prior to the hearing today and during the course of the underlying investigation.

Moreover, it is my view that Mr. Washington's testimony was at times equivocal and somewhat confusing. Accordingly, based on the above, particularly viewing his demeanor, I cannot credit Mr. Washington's version of these events.

Counsel for the General Counsel next called Ms. Tonya Renee Benson; Ms. Benson testified in support of Paragraph 7(a) and (b) of the complaint. Ms. Benson testified that sometime in June of 1996 [sic], Mr. Feinman came to her work area to get some coffee and asked her how she felt about the Union. When he testified in response to this testimony, Mr. Feinman denied that he had any such conversation.

I credit Ms. Benson's version of this conversation. Her testimony was exact and unequivocal. She was cross-examined vigorously by Counsel for the Employer, and her version of this conversation remained, in my view, to be the most plausible.

Ms. Benson also testified that Ms. Hale approached her in the break room and asked her, among other things, how she was going to vote. Ms. Hale, in her testimony, denied that any such conversation took place and said she never asked any employee how they were going to vote in a Union election.

With respect to this conversation, I also credit Ms. Benson's version. I do this based on her overall demeanor and her unequivocal testimony. Ms. Hale, although quite sincere, was hesitant at times, and her responses were at other times somewhat evasive.

Finally, Ms. Montgomery was called by Counsel for the General Counsel and testified in support of Paragraph 7(a)(4). In this regard, Ms. Montgomery testified that Mr.

Feinman called her into his office to talk about or to discuss her giving a ride to [sic] and from work to a fellow employee. In this regard, Ms. Montgomery had testified that for approximately three months, she had given Ms. Helen Mays a ride to [sic] and from work and was paid \$5 a day by Ms. Mays.

Ms. Montgomery stated that Mr. Feinman told her—he did not want her to take Ms. Mays home anymore because she, Ms. Mays, was a union supporter; Mr. Feinman offered to give Ms. Montgomery \$6 a day if she would discontinue giving the ride to Ms. Mays. Mr. Feinman testified that he did not call Ms. Montgomery to his office, but that such a meeting did occur, but that she came voluntarily because she was upset.

According to Mr. Feinman, Ms. Montgomery was upset because some employees were treating her indifferently and some employees were being unfriendly toward her. According to Mr. Feinman, he asked her if she knew of anything that might be causing the employees to treat her as such. According to Mr. Feinman, her response was, well, it may be Helen Mays.

Mr. Feinman stated that he asked Ms. Montgomery why she was giving Ms. Mays a ride to and from work, to which Ms. Montgomery replied that Ms. Mays was paying her.

Mr. Feinman then stated that he offered Ms. Montgomery money because his understanding of this circumstance was that maybe Ms. Montgomery needed some money and that, since she had borrowed money from him in the past, he would offer her money now in the hopes that this would address or alleviate her problem. Mr. Feinman denied that he offered to give money to Ms. Montgomery to discontinue— to have her discontinue giving Ms. Mays a ride.

Based on the overall demeanor, as well as the consistency and plausibility of her testimony, I credit the version of these facts as offered by Ms. Montgomery. In this regard, Mr. Feinman, although he appeared to be a sincere individual, was quite equivocal in areas of his testimony.

Moreover, his version of this critical conversation was somewhat problematic for me and, to a certain extent, was improbable and at times confusing. In fact, I still don't understand why Mr. Feinman felt the offer of money to Ms. Montgomery was a logical response to her giving a fellow employee a ride for which she was reimbursed.

That concludes my finding and conclusions of the hearing today. Based on these resolutions of credibility, I have found that the Company has not violated Section 8(a)(1) as alleged in Paragraph 7(a)(2) and (3). And I shall recommend that these allegations be dismissed.

However, I do find that the Company has violated Section 8(a)(1) of the Act as alleged in Paragraph 7(a)(1) and (4), as well as Paragraph 7(b) of the complaint. Accordingly, I shall issue a recommended order that the Company cease from engaging in such unlawful conduct and to post an appropriate notice remedial of the violations found.

Upon receipt of the transcript, I will issue a certification that will include a brief statement of the case, as well as the transcript pages that embody the decision that I am issuing today. If you desire at that time or—if you desire upon receipt of the certification to file exceptions, your time period runs from the date of the certification.

JUDGE FRYE: Are there any questions?

(No response.)

JUDGE FRYE: Again, thank you, very much. And I wish the best to each of you.

With that, we'll conclude out hearing at 3:50—no—that's 2:50, isn't it—2:50.

(Whereupon, at 2:50 p.m., the hearing was concluded.)

#### APPENDIX B

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

to organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities, sympathies, or desires.

WE WILL NOT promise monetary benefits to our employees if they stopped helping or assisting a union supporter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

BRITWILL INVESTMENTS II, INC., D/B/A PLEASANT MANOR LIVING CENTER